

**ST 04-6**

**Tax Type: Sales Tax**

**Issue: Responsible Corporate Officer – Failure to File or Pay Tax**

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

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**THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS**

v.

**JOHN DOE,**

**Taxpayer**

**Docket No. 02-ST-0000  
IBT # 0000-0000  
NPL # 0000**

**Charles E. McClellan  
Administrative Law Judge**

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**RECOMMENDATION FOR DECISION**

**Appearances:** George Foster, Special Assistant Attorney General, for the Illinois Department of Revenue; John Doe, *pro se*.

**Synopsis:**

This matter came on for evidentiary hearing on December 5, 2003 following the filing of a timely protest to a Notice of Penalty Liability ("NPL") issued by the Department of Revenue ("Department") on June 19, 2003, to John Doe ("Taxpayer"). The NPL, in the amount of \$70,982.35, was issued to Taxpayer as a responsible officer of ABC, Inc. d/b/a XYZ Liquors ("ABC"), a Subchapter S corporation that operated a liquor store located at, Anywhere, Illinois. The issue is whether Taxpayer is liable, as a

responsible person, for the penalty assessed him under § 735/3-7 of the Uniform Penalty and Interest Act.<sup>1</sup>

The record establishes that Taxpayer was a responsible party and that he is liable for the penalty assessed in the NPL. I recommend that the NPL Liability issued in this case be made final.

**Findings of Fact:**

1. The Department issued NPL No. 0000 to the Taxpayer on July 19, 2002 assessing penalties pursuant to 35 ILCS 735/3-7 for the months of October 1998 through October 2000. Dept. Ex. No. 1.
2. Taxpayer and Ron Doe (“Ron Doe”), who were officers of ABC, each owned 50% of its capital stock. *Id.*, Tr. p. 28
3. ABC had one bank account for which Taxpayer and Ron Doe were authorized signatories. *Id.*, *Id.* at 19.
4. ABC conducted a liquor store operation under the name of XYZ Liquors from October 1998 until October 2000. *Id.*
5. When ABC began conducting its business, Ron Doe worked at the store on a full time basis and Taxpayer worked there several evenings and on weekends. *Id.* at pp.14, 29-31.
6. Taxpayer has a bachelor’s degree in marketing. *Id.* at 18.
7. Prior to October 1998, Taxpayer worked at XXXXX for “about “ eight years, progressing from being a salesperson to a manager position. *Id.* at 18-19.

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<sup>1</sup> Unless otherwise noted, all statutory references are to 35 ILCS 735/1, *et seq.*, the Uniform Penalty and Interest Act. (“UPIA”).

8. Sometime during the year 2000, Ron Doe went to work elsewhere and Taxpayer took over the operation of the liquor store full time, including signing checks and paying all of the bills. *Id.* at 20, 29-31.
9. When Taxpayer began working at the liquor store on a more full time basis, he took over the responsibility of giving the outside accountant the information necessary to prepare the sales tax returns which Taxpayer signed. *Id.* at 21.
10. Before Taxpayer took over the operation of the liquor store full time, he looked over the books and records noticing that they were incorrect. *Id.* at 23.
11. ABC did not report all of its sales on its sales tax returns. *Id.* at 20, 29-31.
12. Taxpayer knew that sales were being under reported on ABC's sales tax returns. *Id.* at 32-35.

**Conclusions of Law:**

The issue in this case is whether Taxpayer is personally liable for the statutory penalty provided for failure to pay the Retailers' Occupation Tax Act, 35 ILCS 120/1 *et seq.*, ("sales tax") collected by ABC during the periods set forth in the Notice of Penalty Liability issued to Taxpayer. The operative statutory provision that imposes personal liability for the taxes due under the Retailers' Occupation Tax Act is Section 3-7(a) of the Uniform Penalty and Interest Act ("UPIA"). In relevant part, it provides as follows:

Any officer or employee of any taxpayer subject to the provisions of a tax Act administered by the Department who has the control, supervision or responsibility of filing returns and making payment of the amount of any trust tax imposed in accordance with that Act and who willfully fails to file the return or make the payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the taxpayer including interest and penalties thereon. The Department shall determine a penalty due under this Section according to its best judgment and information, and that determination shall be *prima facie*

correct and shall be *prima facie* evidence of a penalty due under this Section. Proof of that determination by the Department shall be made at any hearing before it or in any legal proceedings by reproduced copy or computer printout of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue . . . .  
35 ILCS 735/3-7(a)

In this case, once the Department introduced into evidence the Notice of Penalty Liability and the Notice of Deficiency under the Director's certificate, its *prima facie* case was made on the questions of responsibility and willfulness. *Branson v. Dept. of Revenue*, 168 Ill.2d 247, 261-262 (1995). The burden then shifted to the Taxpayer to overcome the Department's case. *Id.* To rebut the Department's *prima facie* case, Taxpayer had to come forward with sufficient evidence to disprove the Department's case. *Id.* at 262.

In applying the penalty tax and determining willfulness, the Illinois courts look to federal cases involving § 6672 of the Internal Revenue Code<sup>2</sup> which contains language similar to the Illinois statute. *Id.* at 254. The fact that a person was an officer of a corporation does not, *per se*, mean that he was the person who had the duty to collect, account for and pay over the tax. *Monday v. U.S.*, 421 F.2d 1210, (7th Cir. 1970), *cert. den.* 400 U.S. 821. However, the fact that another person may have had that responsibility does not mean that the officer was not also responsible. *Id.* The liability attaches to those who have the power and responsibility within the corporation for seeing that tax owed is paid and that responsibility is generally found in high corporate officials charged with general control over corporate business. *Id.* Responsibility is not a matter of knowledge, but rather a matter of status and authority. *Mazo v. U.S.*, 591 F.2d 1151 (5th Cir. 1979)

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<sup>2</sup> 26 U.S.C. § 6672.

Taxpayer offered into evidence the Forms W-2 he received from his employers for the years 1999 and 2000 to show that he was employed during those years. Taxpayer testified on his own behalf. Initially he testified that during the period when he worked at the liquor store only on evenings and weekends, he did not have time or the opportunity to examine the company's records or the sales tax returns. However, Taxpayer did not contradict Ron Doe's testimony (Tr. p. 32) that he knew that sales were being under reported on sales tax returns from the start of the business.

To prove its case, a taxpayer must present sufficient documentary evidence to support its claims for exemption. Testimony alone is not enough. *Mel-Park Drugs, Inc. v. Department of Revenue*, 218 Ill.App.3d 203 (1st Dist. 1991). The record shows that Taxpayer was a college graduate with a degree in marketing. He was an officer and a 50% shareholder of ABC. He also had check signing authority for the company's checking account and access to the books and records of the company. He also knew that sales were being under reported on ABC's sales tax returns while vendors were being paid. In this case, Taxpayer failed to introduce sufficient documentary evidence to overcome the Department's *prima facie* case.

These factors establish that Taxpayer has a background in retailing, and that he shared responsibility for properly reporting sales on ABC's sales tax return. They also demonstrate that he willfully failed to properly report sales on the company's sales tax returns and he failed to pay the sales taxes or to see that they were paid.

For the reasons set forth above, I recommend that the Notice of Penalty Liability be made final.

Date: 2/20/200

Charles E. McClellan  
Administrative Law Judge